

SPECIAL COUNSEL: 5 CONCORD RD

MARSH, MORIARTY, ONTELL & GOLDER, P. C.

ATTORNEYS AT LAW
18 TREMONT STREET, SUITE 900
BOSTON, MASSACHUSETTS 02108
(617) 778-5100
TELECOPIER (617) 720-2565

MICHAEL H. MARSH
ROBERT J. MORIARTY, JR. †
JEFFREY L. ONTELL
RICHARD M. GOLDER

EDWARD A. ACTON
LAURA L. FITZGERALD
LAURA J. NEWCOMB
MICHAEL D. BUONICONTI
COURTNEY D. HILLIARD

OF COUNSEL
JOSEPH T. RUBINSTEIN

† ALSO ADMITTED IN NEW HAMPSHIRE

By **FIRST CLASS MAIL AND
EMAIL**

October 24, 2016

Town of Wayland
Attn: Nan Balmer, Town Administrator
41 Cochituate Road
Wayland, Massachusetts 01778

Re: **Town Library Site Use Restrictions
5 Concord Road, Wayland, Massachusetts**

Dear Ms. Balmer:

You have retained this firm to provide a legal opinion as to whether the land now owned by the Town of Wayland (the "Town") situated at 5 Concord Road, Wayland (the "Site") is subject to restriction which requires the land to be used as a library in perpetuity. This letter is intended to provide you with our opinion regarding this matter, and a summary of the research upon which that opinion is based.

To assist with our task, we were provided with a copy of a letter from Mark J. Lanza, Esq. to Aida A. Gennis, Chair of the Board of Library Trustees dated March 30, 2016. We have assumed as true the facts set forth in the "Factual Background" portion that letter. Specifically, those facts include the following:

The Town's title to the Site is derived from three separate grants.

The first grant is evidenced by the deed from Cynthia C. Roby, Executrix of the Estate of Warren Gould Roby dated September 4, 1899 and recorded with the Middlesex South Registry of Deeds in Book 2764, Page 141 (the "Roby Grant"). The land conveyed therein is described as "Library Lot ½ acre" as shown on a plan entitled "Plan of a Portion of the Warren G. Roby Estate as set off for the Wayland Public Library," dated June 29,

MARSH, MORIARTY, ONTELL & GOLDER, P.C.

Town of Wayland
October 24, 2016

1899, prepared by W.A. Mason & Son Surveyors, and recorded as Plan No. 7 in Plan Book 119. The Will of Warren Gould Roby, who died in 1897, provides, in part, as follows: "I give to the Town of Wayland ...[the above described land]. And to erect a building thereon for use as a public library ... I give to the Town of Wayland the sum of twenty-eight thousand dollars." At the 1898 Annual Town Meeting held on March 28, 1898, the Town voted to accept the gift under the will of Roby, "to be devoted to the erection of a building thereon to be used as a Public Library."

The second grant, also a gift to the Town, is evidenced by a deed from Amos I. Hadley and Alfred W. Cutting to the Town of Wayland, dated March 20, 1923 recorded in Book 4598, Page 82 (the "Hadley & Cutting Grant"). The deed does not reference a plan and no purpose for the grant is stated in the deed. In the Report of the Library Trustees in the 1922 Annual Town Report, the Trustees reported that the land would provide sufficient additional land to protect the library. At the 1923 Annual Town Meeting, held on March 5, 1923, the Town voted to accept the gift of "about 16,000 square feet of land adjoining the library lot ... to enlarge and protect the property."

The third grant is evidenced by a deed from Mary A. Clifford f/k/a Mary A. Brackett to the Town dated February 7, 1955 and recorded in Book 8412, Page 490 (the "Clifford Grant"). The consideration for the deed is less than one hundred dollars. No purpose or use is stated in the deed. The deed describes the property as Lot A on a plan entitled "Plan of Land in Wayland, Mass. of Land (sic) to be acquired by the Wayland Public Library" dated January 24, 1955, prepared by Everett M. Brooks Co. Civil Engineers. The plan is recorded as Plan No. 235 of 1955. At the 1955 Annual Town Meeting held on March 9, 1955, the Town voted to accept the gift. The vote references the recorded deed and plan, and describes the land as being "adjacent to the Wayland Public Library."

As further discussed below, it is our opinion that a Court would be more likely than not to conclude that the Roby Grant is restricted in use in perpetuity, and that the Hadley & Cutting Grant and the Clifford Grant are not restricted.

Sections 23 and 26 through 30 of G.L. c. 184 concern the limitation and enforcement of conditions or restrictions affecting the title or use of real property. Section 23 provides that conditions or restrictions unlimited as to time shall be limited to a term of 30 years. This section is not applicable in the instant case, as it excludes gifts or devises for public purposes.

Section 28 provides that ancient restrictions (imposed prior to January 1, 1962) are not enforceable 50 years after imposition, unless certain statutory requirements regarding the recording of a notice of restriction are met. G.L. c. 184, § 28. Unlike Section 23, Section 28 makes no explicit exception for gifts or devises for public purposes. However, Section 28 is not applicable when a gift or devise creates a public charitable trust. See Dunphy v. Commonwealth, 368 Mass. 376, 384 (1975). Such public charitable trusts must be "sacredly observed." See

MARSH, MORIARTY, ONTELL & GOLDER, P.C.

Town of Wayland
October 24, 2016

Newburyport Redevelopment Authority v. Commonwealth, 9 Mass. App. Ct. 206, 229 (1980) (quoting MacDonald v. Street Commrs. of Boston, 268 Mass. 188 (1929)).

Property conveyed to a governmental body for a particular purpose may be subject to an enforceable general public obligation or trust to use the property for that purpose. Nickols v. Commissioners of Middlesex County, 341 Mass. 13, 18 (1960). Whether or not an enforceable general public obligation or trust to use property for a particular purpose is created is to be ascertained by looking at the grantor's intent, as determined from the interpretation of each instrument as a whole in light of the attendant facts and circumstances. Id. at 19. "A mere statement in a grant of the use to which the grantee contemplates putting the granted premises or of the purpose for which the grant is made is insufficient to create an enforceable trust." See Newburyport Redevelopment Authority, 9 Mass. App. Ct. at 229.

In applying these principals, Courts have found that instruments stating that land is to be used "forever" or "only" for a particular purpose or containing language of similar import have established public charitable trusts. E.g., Opinion of the Justices to the Senate, 369 Mass. 979, 985 (1975) (property to used "forever" for a public park and playground); Dunphy v. Commonwealth, 368 Mass. at 383 (property to be used "in perpetuity for the public good") ; Nickols v. Commissioners of Middlesex County, 341 Mass. at 18-23 (property to be used for "sole and exclusive purpose"); Cohen v. City of Lynn, 33 Mass. App. Ct. 271 (1992) (property to be used as a park "forever"); Board of Selectmen of Provincetown v. Attorney General, 15 Mass. App. Ct. 639, 642-643 (1982) (property to be used "for purposes of a public library" but if, on a certain date, the town had other property that was or could be used for such purpose or did not accept the gift, then the sale proceeds were to be added to the residue of the decedent's estate); Town of Chelmsford v. Greater Lowell Council, Inc.-Boy Scouts of America, Land Court Department, Misc. Case No. 261762, Decision on Cross Motions for Summary Judgment (April 26, 2001) (property never to be sold by grantee Boy Scouts to anyone other than grantor).

On the other hand, instruments stating the intended or contemplated use or purpose of a grant do not necessarily create a trust. A more definite expression of intention in the way of the granting language or attendant circumstances will generally be required. E.g., Opinion of the Justices, 369 Mass. at 985 (property to be used as a public park and playground now in development); Loomis v. City of Boston, 331 Mass. 129 (1954) (property to be used "for the purposes of a public park"); MacDonald, 268 Mass. at 294-296 (grantors are "desirous that" property be put to a specified use); Hillman v. Roman Catholic Bishop of Fall River, 24 Mass. App. Ct. 241 (1987) (property to be used by parish for educational, religious or recreational purposes); Town of Arlington v. Pierce, Land Court Department, Reg. Case No. 547-S, Decision (February 4, 1981) (property given in memory of another to be used as a playground for children in a particular school district).

In determining if a public charitable trust has been created, Courts also look to the circumstances surrounding the grant, to determine if there is a general plan or an expression of a consistent and

MARSH, MORIARTY, ONTELL & GOLDR, P.C.

Town of Wayland
October 24, 2016

harmonious purpose. Nickols, 341 Mass. at 19 (and cases cited). For example, in finding that a public charitable trust had been created, one court relied not only upon the language of the deed, but also upon the park commissioner's report, which stated that the owners of the land were willing to sell for a reasonable price if the land was dedicated to public use and discussed less desirable alternatives to the town's acquisition, and upon the town's annual report, which stated that the land was to be secured for public enjoyment "forever." Cohen, 33 Mass. App. Ct. at 274-277.

Significantly, a more recent Land Court case also finds a general plan in support of a public charitable trust, even though the deed does contain the term "forever" or language of similar import. In that case, a deed conveys a way to a city, stating that the granted premises "are to be used by said grantee as a public highway". 20 Sevon Street LLC v. City of Waltham, 2008 WL 4262290, Land Court Department, Case No. 07 PS 350586, Order Allowing Plaintiff's Motion for Summary Judgment (September 17, 2008). The Court determined that the way is held in trust for use as a public way. Id. Although the Court found the language of the deed to be clear and unambiguous, it also relied upon the fact that the deed gave the Town certain grading rights, that the vote authorizing the conveyance by the grantor referenced the private way and noted that the only consideration was an abatement of certain assessments made by the town, that the way connected two other streets, and that the grantor of the way must have intended the way to remain public because he held land on both sides of it. Id.

In looking at the particular grants which together comprise the Site in light of these court decisions, I find the Roby Grant to be most problematic for the Town. The fact that the donor's Will explicitly states that a library is to be erected on the land, and that money is provided by the donor to do so, seems to be evidence of a consistent and harmonious plan sufficient to establish a public charitable trust. I believe, therefore, that a Court is more likely than not to find this grant to be restricted in perpetuity. The other two grants are less problematic. The deed by which the Town acquired the Hadley & Cutting Grant does not make any statement of intended use and does not reference a plan. And although the Library Trustees report that the grant would "protect" the library and the Town voted to accept the gift "to enlarge and protect" it, neither of these facts constitute direct evidence of the donor's intent. If the Court were to decide that the Hadley & Cutting Grant is held in trust, it would have to extrapolate from the Town's actions that the donors must have intended that result. Although not outside the realm of possibility given that the grantors' deed is dated just 15 days after the annual town meeting, I do not consider it likely that a court would reach that result. The deed by which the Town acquired the Clifford Grant also makes no statement of intended use or purpose. It references only the plan of land to be acquired by the library. It is my opinion that a Court is more likely than not to find that the Hadley & Cutting Grant and the Clifford Grant are not held in trust, and that any restriction on the Town's use of these parcels has expired.

MARSH, MORIARTY, ONTELL & GOLDER, P.C.

Town of Wayland
October 24, 2016

Please note, however, that the question of whether or not a public charitable trust has been created, thereby restricting use of the land in perpetuity, is a question of fact. If the Town is facing any opposition to its plan to relocate the library from the Site, and the parties cannot come to an agreement, more likely than not litigation will be necessary to determine the matter unless the parties agree to mediation or arbitration .

Please advise if you have any questions or concerns, or if I can be of further assistance with this matter.

Very truly yours,



Jeffrey L. Ontell

cc: Mark J. Lanza, Esq.

G:\CJ\51474\Lit Town 102416

Balmer, Nan

Subject:

FW: Wayland

From: Jeffrey Ontell [<mailto:jontell@mmoglaw.com>]
Sent: Wednesday, November 02, 2016 3:53 PM
To: Balmer, Nan
Cc: milanza@comcast.net
Subject: RE: Wayland

Nan,

There is a doctrine called "cy pres" and there are other similar doctrines which if applicable could allow the Town to either use the library site for another purpose or to sell the land and use the sale proceeds for acquisition and construction of a new library site.

We have not researched these doctrines. Let me know if you want us to do so. If the answer is in the affirmative, the conference call should wait until the research is accomplished and I provide a letter with my analysis.

Jeff
Jeffrey L. Ontell, Esq.
Marsh, Moriarty, Ontell & Golder, P.C.
18 Tremont Street, Suite 900
Boston, MA 02108

From: Balmer, Nan [<mailto:nbalmer@wayland.ma.us>]
Sent: Wednesday, November 02, 2016 2:54 PM
To: jontell@mmoglaw.com
Subject: Wayland

Hi Jeff

I was unable to schedule a conference with the Chair of the Library Trustees. I will get back to you when I have more information about when the Chair is available. There is interest in hearing anything you might say about the "Roby" paragraph as it relates to the possibility of selling the library to a developer or using it for another municipal purpose.

Thanks,

Nan
Nan Balmer, Town Administrator
Town of Wayland

